FILED
AUG 2 1991
OFFICE OF THE CLERK

No. 91-8

In The

Supreme Court Of The United States

OCTOBER TERM, 1991

UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 376,
Petitioner,

v.

OLIVETTI OFFICE U.S.A., INC. and OLIVETTI SUPPLIES, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION

BRIAN CLEMOW
(Counsel of Record)
RICHARD A. MILLS, JR.
KIMBERLY DEAN CORAN
SHIPMAN & GOODWIN
One American Row
Hartford, CT 06103-2819
(203) 251-5000

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Preliminary Statement 1

Counter–Statement of the Case 2

Argument 7

Conclusion 19

TABLE OF AUTHORITIES

CASES — Page

Continental Web Press, Inc. v. NLRB,
742 F.2d 1087 (7th Cir. 1984) 16

Detroit Edison Co. v. NLRB,
440 U.S. 301 (1979) 12

Emhart Indus. Hartford Div. v. NLRB,
907 F.2d 372 (2d Cir. 1990) 15

Fibreboard Corp. v. NLRB,
379 U.S. 203 (1964) 18

First National Maintenance Corp. v. NLRB,
452 U.S. 666 (1981) 18

Local 60, United Bhd. of Carpenters
and Joiners v. NLRB, 365 U.S. 651 (1961) 12, 17

Nathanson v. NLRB, 344 U.S. 25 (1952) 10

NLRB v. Aeronautical Industrial
District Lodge No. 91, 934 F.2d 1288 (2d Cir. 1991) 15

NLRB v. Greensboro News & Record, Inc.,
843 F.2d 795 (4th Cir. 1988) 16

NLRB v. J.H. Rutter–Rex Mfg. Co.,
396 U.S. 258 (1969) . . . . . *passim*

Page

NLRB v. Maywood Plant of Grede Plastics,
628 F.2d 1 (D.C. Cir. 1980) 16

NLRB v. Mountain Country Food Store, Inc.,
931 F.2d 21 (8th Cir. 1991) 15

NLRB v. Seligman & Associates,
808 F.2d 1155 (6th Cir. 1986), cert. denied,
484 U.S. 1026 (1988) 8, 13, 14

NLRB v. Seven–Up Bottling Co.,
344 U.S. 344 (1953) 10

NLRB v. Wallkill Valley General Hospital,
866 F.2d 632 (3d Cir. 1989) 8, 13, 14

Phelps Dodge Corp. v. NLRB,
313 U.S. 177 (1941) 11

Sure–Tan, Inc. v. NLRB, 467 U.S. 883 (1984) . . . . . *passim*

Texas Petrochemicals Corp. v. NLRB,
923 F.2d 398 (5th Cir. 1991) 15

STATUTES

29 U.S.C. §158(a)(1) 4, 5

29 U.S.C. §158(a)(3) 4, 5

29 U.S.C. §158(a)(5) 4, 5

Page

29 U.S.C. §158(d) 4

29 U.S.C. §160(f) 6

OTHER AUTHORITIES

Supreme Court Rule 10.1 7

No. 91-8

IN THE
SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1991

UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 376,

Petitioner,

v.

OLIVETTI OFFICE U.S.A., INC. and OLIVETTI SUPPLIES, INC.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION

I. PRELIMINARY STATEMENT

The petitioner, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 376

("UAW Local 376") has filed a petition for a writ of certiorari, seeking review of the decision of the Court of Appeals for the Second Circuit in consolidated Case Nos. 90–4068, 90–4082 and 90–4094, issued on February 14, 1991 and set forth at 926 F.2d 181. This brief in response to the petition for a writ of certiorari is respectfully submitted on behalf of respondents Olivetti Office U.S.A., Inc. and Olivetti Supplies, Inc.[1]

II. COUNTER–STATEMENT OF THE CASE

On April 9, 1984, the respondents' predecessor in interest, Roytype Division, Royal Business Machines, Inc. ("Roytype") notified its employees that in order to reduce substantial operating losses, Roytype had no alternative but to relocate its Newington, Connecticut manufacturing operations. This decision followed extensive discussions with union representatives, which began on November 21, 1983, regarding the company's historical losses of millions of dollars per year, its projected losses for the future, and prior attempts to reduce manufacturing costs. During these discussions, the parties tried unsuccessfully to find alternatives which would allow the company to reduce its operating losses to a point where the company could break even while remaining at its Newington facility.

---

1 Respondent Olivetti Office U.S.A. is owned by respondent Olivetti Supplies, Inc. and by Triumph–Adler AG. Respondent Olivetti Supplies, Inc. is owned by Baltea S.p.A., which is in turn owned by Olivetti Office S.R.L., which is owned by Ing. C. Olivetti & C. S.p.A. There are no subsidiaries or affiliates of either Olivetti Office U.S.A., Inc. or Olivetti Supplies. Inc.

In the course of these discussions and at the request of the union, Roytype provided the union with substantial amounts of information regarding Roytype's financial condition, together with information regarding the potential savings which could be secured by subcontracting or relocating Roytype's manufacturing operations. The information demonstrated that the potential savings from relocating the production work from Connecticut amounted to $2.6 million per year, as compared to a total one–time relocation cost of $2 million. Of the potential $2.6 million annual savings, just under $2 million was in wages and fringe benefits, with the remainder resulting from reduced overhead costs, including non–union salaries and fringe benefits, rent and utilities. The union conceded that it could find no alternative which would allow the company to achieve such a significant savings and still remain in Connecticut.

Despite the fact that after several months of discussions, both the union and the company had concluded that relocation was inevitable if the company were to become financially viable, the union on March 28, 1984 requested large amounts of additional information from the company, and refused further discussions until the information was provided. However, because it had become clear to all parties that there was no economic alternative to relocation, and because the company needed to curtail its staggering losses which were mounting daily, the company was compelled to proceed with the relocation plan. The company notified its employees on April 9, 1984 that the relocation plan would be implemented.

Given the complexity of Roytype's operations, the relocation plan had to be implemented over a three year

period, beginning in 1984. Relocation was completed in 1987, at a total cost in excess of $4 million. Because the relocation plan was implemented in stages over a three year period, certain operations continued in Connecticut during the relocation process.[2] In March of 1985, the union and the company reached agreement on a successor to their existing collective bargaining agreement, which expired on March 23, 1985, to cover the few employees who remained in Connecticut as the relocation process was completed. At the same time, the parties reached agreement on the effects of the relocation decision.[3]

On April 18, 1984, unfair labor practice charges were filed against Roytype by the union with the National Labor Relations Board ("NLRB" or "Board"). A hearing was held before an administrative law judge from January 28 through February 1, 1985. In a decision dated August 20, 1985, the judge concluded that Roytype had violated Sections 8(a)(1), 8(a)(5) and 8(d) of the National Labor Relations Act ("Act" or "NLRA") by failing to furnish information to the union. He further concluded that Roytype had violated Sections 8(a)(1), 8(a)(3) and 8(d) of the Act by discriminating against

---

2 In its petition, the union states that six months after the judge's initial decision, the company modified its lease to accelerate its termination date. The company did not modify its lease to accelerate its termination date, but entered into a lease modification agreement whereby it leased back a portion of the Newington facility which was no longer needed, at a cost of $125,000.

3 There is no dispute in this case that the company fully satisfied its obligation to bargain over the effects of the relocation decision.

its employees by failing to provide the union with information and thereby failing to bargain in good faith, and by terminating bargaining unit employees through plant closure in violation of the terms of the contract.

The judge declined to order restoration of the work to Connecticut, a remedy which he found impractical and unduly burdensome. The judge did, however, order back pay for bargaining unit employees from the date of layoff through the expiration of the collective bargaining agreement between Roytype and the union on March 23, 1985.

All parties filed exceptions to the decision of the judge with the NLRB. On June 30, 1987, nearly two years after the judge issued his decision, the Board issued its decision. The Board ruled that the judge's finding regarding Section 8(a)(3) of the Act exceeded the scope of the issues litigated. However, the Board held that Roytype had violated Sections 8(a)(1) and 8(a)(5) by failing to bargain to impasse before implementing its subcontracting and relocation plans, and by refusing to furnish the union with requested information. The panel remanded the case to the judge to determine the appropriate remedy, based upon the judge's apparent error in assuming that the Newington facility had been completely shut down.

In accordance with the Board's remand, a hearing was held before the administrative law judge from November 3 through November 5, 1987. On March 31, 1989, nearly a year and a half after the conclusion of the hearing, the judge issued a supplemental decision. The judge ordered Roytype to bargain with the union over the decision to subcontract and relocate work from the Connecticut facility and to pay

all bargaining unit employees until the bargaining obligation was satisfied.

On May 22, 1990, more than a year after the judge issued his decision, and over six years from the initial filing of charges, the Board issued a supplemental decision and order. In place of the judge's remedy, the Board ordered Roytype to offer reinstatement to all bargaining unit employees at Roytype's current facilities, displacing, if necessary, any persons employed at those facilities. Further, the Board ordered Roytype to pay all employees back pay from the date of their layoff "to the date of the offer of reinstatement, or for the employees who decide not to relocate, until the date they secure substantially equivalent employment with other employers."

On June 1, 1990, Olivetti Office U.S.A., Inc. filed a petition for review pursuant to Section 10(f) of the NLRA with the Court of Appeals for the Second Circuit. On July 19, 1990, Olivetti Office U.S.A., Inc. and Olivetti Supplies, Inc. filed an amended petition for review adding Olivetti Supplies, Inc. as a petitioner. The union also filed its own petition for review dated June 25, 1990. On July 19, 1990 the Board filed a petition for enforcement of its order. The three cases were then consolidated.

The Court of Appeals for the Second Circuit issued its decision in the consolidated cases on February 14, 1991. In its decision, the Second Circuit affirmed the Board's determination that the company committed an unfair labor practice, but found that the remedial order imposed by the Board served no legitimate purpose of the Act. The court therefore modified the Board's order to terminate back pay

on March 23, 1985, the date on which the parties reached agreement on a new collective bargaining agreement, and presumably would have concluded negotiations over work relocation if bargaining to impasse had occurred, and enforced the Board's order as modified.

III. ARGUMENT

The petitioner presents two questions for review. As discussed below, neither of these two questions present the "special and important reasons" which justify review.[4]

The first question proposed by the petitioner asks whether the Second Circuit's refusal to enforce the NLRB's remedy due to the NLRB's six-year delay in reaching a final decision requires the consequences of the NLRB's delay to be placed upon wronged employees to the benefit of wrongdoing employers. The question is not appropriate for Supreme Court review for several reasons.

First, the question completely misstates the basis for the Second Circuit's refusal to enforce the NLRB's order. That refusal was not based on the NLRB's six year delay per se, but on the failure of the Board's remedy to address the wrong to be remedied, and on the failure of such a belated

---

4 Rule 10.1 of this Court expressly states that a petition "will be granted only when there are special and important reasons therefor." While the considerations specifically set forth in Rule 10.1 are not intended to be exhaustive, the two questions posed by the petitioner do not in any way raise the kind of issues provided as examples in that Rule.

remedy to further any legitimate purpose of the NLRA. Moreover, despite the petitioner's arguments to the contrary, the decision of the Second Circuit is not inconsistent with this Court's decisions in NLRB v. J.H. Rutter–Rex Mfg. Co., 396 U.S. 258 (1969) or Sure–Tan, Inc. v. NLRB, 467 U.S. 883 (1984), nor is it in conflict with the holdings of the Third and Sixth Circuits in NLRB v. Wallkill Valley General Hospital, 866 F.2d 632 (3d Cir. 1989) and NLRB v. Seligman & Associates, 808 F.2d 1155 (6th Cir. 1986), cert. denied, 484 U.S. 1026 (1988).

The petitioner would have this Court believe that the Court of Appeals considered the Board's delay in a vacuum, simply deciding that because the Board delayed excessively, its order was automatically unenforceable. That is plainly not the case. Rather, the court examined the Board's delay in order to determine whether, given the passage of time, the Board's remedial order served any legitimate purpose of the Act. The court concluded that the Board's order not only failed to serve a legitimate purpose of the Act, given the passage of time, but also wholly failed to remedy the wrong committed.

As the Second Circuit recognized, the violation found by the NLRB was not the company's relocation of operations from Connecticut, but rather its relocation of those operations without first fully satisfying its statutory obligation to bargain to impasse. The Board's back pay order, which required the respondents to pay back pay for a period of at least six years, and thereafter into the indefinite future, utterly failed to remedy the wrong committed, since it necessarily assumed that had the parties engaged in continued discussions concerning the relocation decision in

1984, they would never have reached agreement or even a bona fide impasse over the issue.

The Second Circuit recognized the absurdity of that assumption, and examined the evidence to determine how long the parties would reasonably have continued discussing the relocation issue before reaching agreement or impasse. The court found, based on the evidence in the record, that had the parties bargained over the relocation decision, the process would have continued, at the longest, to the point when a new collective bargaining agreement was negotiated.

The court then recognized that the Board's order, which obligated the company to pay back pay indefinitely, provided employees with an enormous windfall which went far beyond compensating them for any actual losses caused by the underlying offense. Because such an order served only to penalize the employer and failed to remedy the wrong committed, the court concluded it exceeded the Board's authority and was therefore unenforceable. The court therefore modified the Board's order to provide a remedy which compensated the employees for their actual losses.

Such a result is in no way inconsistent with this court's decision in Rutter-Rex. In Rutter-Rex, the NLRB ordered an employer which had improperly failed to reinstate striking employees to provide back pay to those employees through December 1961, the time when the NLRB filed a back pay specification. The Court of Appeals modified the Board's order to eliminate all back pay accrual after July 1, 1959 because the NLRB had engaged in an inordinate delay which

had lulled the employer into the belief that no further action would be taken by the Board. This Court reversed the Court of Appeals' ruling, stating that "the Court of Appeals' modification, cutting off the accrual of back pay at the arbitrary date of July 1, 1959, left the employees who had not been reinstated by that date worse off than they would have been but for the company's wrongful action in refusing reinstatement." Id. at 263 (emphasis added).

Quoting Nathanson v. NLRB, 344 U.S. 25, 27 (1952), this Court stated in Rutter–Rex that "[a] back pay order is a reparation order designed to vindicate the public policy of the statute by making employees whole for losses suffered on account of an unfair labor practice." Id. at 263. The Court further noted that back pay orders issued by the NLRB "should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." Id. at 263 (quoting NLRB v. Seven–Up Bottling Co., 344 U.S. 344, 346–47 (1953)).

In Rutter–Rex, were it not for the employer's violation of the Act, the employees who were the beneficiaries of the Board's remedy surely would have been gainfully employed throughout the period covered by the Board's back pay order. In the present case, by contrast, the Roytype employees could not reasonably have expected to remain employed while their union negotiated for more than six years with a company losing several million dollars per year. To the extent the Board's remedy continued beyond the latest point at which those negotiations would logically have concluded, it constituted a windfall to the affected em-

ployees and an unwarranted penalty to their former employer.

Contrary to the petitioner's assertions, the court's decision also is entirely consistent with this Court's decision in Sure–Tan, Inc. v. NLRB, 467 U.S. 883 (1984). In Sure–Tan, the employer committed an unfair labor practice by reporting its undocumented alien employees to the Immigration and Naturalization Service ("INS") in retaliation for their participation in union activities. Following this notice to the INS, the illegal workers elected to voluntarily return to Mexico rather than face deportation proceedings. In fashioning a remedy for this violation of the Act, the Seventh Circuit Court of Appeals ordered the employer to make offers of reinstatement to the former employees and to pay the employees back pay for a minimum of six months. The Court of Appeals did so despite its recognition that the six month minimum not only was "obviously conjectural," but also likely exceeded the amount of pay to which the employees otherwise would have been entitled. 672 F.2d at 606 (7th Cir. 1982).

This Court found that the Seventh Circuit had exceeded its narrow scope of review by providing an irreducible minimum of six months' back pay for each employee. This Court explained that "a back pay remedy must be sufficiently tailored to expunge only the actual, and not merely speculative, consequences of the unfair labor practices." 467 U.S. at 900 (emphasis in original) (citing Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 198 (1941)). The Court concluded that "[t]he [Seventh Circuit's] imposition of this minimum back pay award in the total absence of record evidence as to the circumstances of the individual

employees constitutes pure speculation and does not comport with the general reparative policies of the NLRA." Id. at 901 (emphasis added).

The Seventh Circuit's decision in Sure-Tan stands in sharp contrast to the decision at issue here. The Second Circuit understood very clearly its limited role in reviewing NLRB orders. The court also recognized, however, that as this Court has explained, the role of courts of appeals in reviewing NLRB orders "is not that of a passive conduit" and that "the rule of deference to the Board's choice of remedy does not constitute a blank check for arbitrary action." Detroit Edison Co. v. NLRB, 440 U.S. 301, 317 (1979).

In modifying the NLRB's order in this case, the Second Circuit was doing precisely what this Court directed in Sure-Tan—to carefully scrutinize the NLRB's order to ensure that it was sufficiently tailored to remedy the actual consequences of the unfair labor practice at issue. The Second Circuit specifically examined the underlying factual circumstances of the case and properly determined, based upon the record, that bargaining over the relocation decision would not have continued beyond the time when the parties reached agreement on a new contract. Thus, in line with this Court's teachings, the Second Circuit modified the Board's order so as to remedy the underlying conduct at issue, in view of the facts and circumstances in the record.[5] See Local 60, United Bhd. of Carpenters and Joiners v. NLRB, 365 U.S. 651, 655 (1961).

---

5 In its petition, the union states that the Court of Appeals not only ignored the limitations placed on judicial review by this Court in *(Footnote cont.)*

Finally, while the petitioner claims that this Court should grant certiorari on the first question because "[i]ntercession by this Court is also needed to resolve the conflict between the circuits on an important question of federal law," Pet. Br. p. 9, the petitioner's contention is simply inaccurate. There is no split between the circuits on the issue of how the Board's delay should affect a remedy for a violation of the NLRA.

Of the two circuit court decisions from which the petitioner claims the Second Circuit diverges, only one, NLRB v. Wallkill Valley General Hospital, 866 F.2d 632 (3rd Cir. 1989) addresses the issue of Board delay with regard to denying enforcement of its order. The other, NLRB v. Seligman and Associates, Inc., 808 F.2d 1155 (6th Cir. 1986), does not even deal with the issue of NLRB delay. Moreover, like the employees in Rutter–Rex, and unlike the Roytype employees involved in this case, the wrongfully discharged em-

---

(Footnote cont.)

Sure–Tan, but also "gutted the remedial authority of the Board by allowing the Employer to profit from deliberate wrongdoing." Pet. Br. p. 12. Neither the Board nor the Court of Appeals made any finding that the employer engaged in any deliberate wrongdoing. The union bases its claim on the fact that the company did not halt the relocation process once the administrative law judge made his initial determination that the company had violated the Act in August of 1985. Although Roytype may not have completely vacated the Newington facility by the time the administrative law judge issued his initial decision, all three phases of the relocation plan had either been fully completed or substantially implemented by that time, and nearly two–thirds of the bargaining unit employees had been laid off. Roytype had by that time expended such large sums of money in carrying out the relocation plan that its implementation was effectively irreversible.

ployees in Seligman would have continued to work for the employer for the entire period of the back pay order had the unfair labor practice not been committed.

In Wallkill, a decertification petition was filed by the bargaining unit employees. However, since several unfair labor practice charges were pending at the time, the NLRB held the decertification petition in abeyance until the resolution of the unfair labor practice charges.[6] Several years passed from the filing of the initial unfair labor practice charges to the NLRB's final determination against the employer. During this period, the employer unilaterally changed many terms and conditions of employment. Following the Board's decision, the employer argued before the Third Circuit that the Board's inordinate delay in deciding the charges pending before it should preclude enforcement on the Board's order to rescind all unilateral changes.

Unlike the case at bar, the NLRB's remedial order in Wallkill requiring the employer to rescind upon request of the union all unilateral changes found to be unlawful, served the remedial purpose of the Act by making employees whole for the wrong committed. The delay by the NLRB in issuing its final order did not serve to undermine the remedial purpose of the order. Because the employer in Wallkill was relying only on "mere delay" in support of its claim for denial of enforcement of an NLRB order, the Third

---

6 Under then controlling law, the employer was required to preserve the status quo with respect to the terms and conditions of employment until the decertification issue was resolved.

Circuit granted enforcement of the order in line with Supreme Court precedent in Rutter–Rex.

Although the petitioner would have this Court believe otherwise, the Second Circuit has also concluded that "mere delay" is insufficient to deny enforcement of an NLRB order. In NLRB v. Aeronautical Industrial District Lodge No. 91, 934 F.2d 1288 (2d Cir. 1991), the Second Circuit found that the administrative delay of the NLRB between the unlawful acts and the remedial order did not preclude enforcement of the remedy, because the order served the remedial purpose of the Act by making wronged individuals whole. The court distinguished its own decision in Emhart Indus. Hartford Div. v. NLRB, 907 F.2d 372 (2d Cir. 1990), in which the court refused to enforce the NLRB's order because as a result of inordinate Board delay, the order made little sense due to changed circumstances and failed to serve the remedial purpose of the Act to make wronged employees whole.

Moreover, "[o]ther circuit courts of appeals have been quick to recognize their responsibility to deny enforcement of NLRB orders rendered pointless and obsolete by virtue of the NLRB's self–inflicted administrative delay." NLRB V. Mountain Country Food Store, Inc., 931 F.2d 21, 23 (8th Cir. 1991) (passage of six years between filing of an unfair labor practice charge and NLRB's final decision against the employer resulted in an order which was "pointless and obsolete by virtue of the NLRB's self–inflicted administrative delay"); Texas Petrochemicals Corp. v. NLRB, 923 F.2d 398 (5th Cir. 1991) (four year delay by NLRB and events subsequent to filing of unfair labor practice charge could not be ignored in developing a remedy that appropriately protects

employee rights); Continental Web Press, Inc. v. NLRB, 742 F.2d 1087 (7th Cir. 1984) (Board delay rendered it likely that a bargaining order would be irrelevant to current conditions in the plant); NLRB v. Maywood Plant of Grede Plastics, 628 F.2d 1 (D.C. Cir. 1980) (order proposed by Board had become unenforceable or senseless by the time enforcement was sought); NLRB v. Greensboro News & Record, Inc., 843 F.2d 795 (4th Cir. 1988) (NLRB's order both unnecessary and obsolete due to the Board's three year delay).

Like the first question presented by the petitioner, the second question is based entirely on a misstatement of the basis for the Second Circuit's decision. As the premise for its second question, the petitioner asserts that the Court of Appeals "fashion[ed] its own remedy based upon its determination that bargaining over the work relocation decision would have concluded as of the date bargaining over the effects of the decision concluded." Pet. Br. p. i. Contrary to the petitioner's assertions, the court did not conclude that bargaining over the relocation decision necessarily would have concluded as of the time bargaining over the effects of that decision reached conclusion. What was critical to the Court of Appeals, and what the petitioner ignores, is the fact that on March 23, 1985, the parties reached agreement on a new collective bargaining agreement.

The court specifically concluded, based on the evidence in the record, that "had the parties bargained over [the relocation decision], the process would have continued, at the longest, to the point when a new collective bargaining agreement was negotiated." Pet. App. p. 18a. While the parties did reach an agreement concerning the effects of the relocation decision at the same time they reached an agree-

ment on the new contract, it was the parties' negotiations over the new contract, and not simply the parties' agreement over the effects of the relocation decision, which formed the basis for the court's judgment with regard to how long bargaining would have occurred.[7]

From its faulty premise, the petitioner leaps to the conclusion that review of the second question presented is necessary, because the Court of Appeals' decision "allow[s] effects bargaining to excuse an employer's violation of its duty to engage in decision bargaining," Pet. Br. p. 14, and therefore conflicts with Supreme Court precedent in failing to recognize a distinction between decision bargaining and effects bargaining.

First, the petitioner's contention that the Court of Appeals departed from Supreme Court precedent in failing to recognize the distinction between decision bargaining and effects bargaining borders on the frivolous. In its decision, the Court of Appeals took great pains to distinguish between decision bargaining and effects bargaining. Indeed, as the court recognized, one of the defects of the Board's decision was that it "compensate[d] union workers for the effects of the work transfer rather than for the unlawful decision to transfer work without bargaining." Pet. App. p.

---

7 As discussed above, the court's analysis of the evidence to determine how long bargaining would have occurred was in accordance with the directives of this Court that Board orders must remedy the actual losses of employees caused by the underlying violation, Sure-Tan, 467 U.S. at 900, and that Board orders must not be punitive. United Bhd. of Carpenters, 365 U.S. at 655.

16a (emphasis in original). Thus, it can hardly be said that the Court of Appeals did not appreciate the distinction between decision bargaining and effects bargaining, as articulated by this Court in such cases as Fibreboard Corp. v. NLRB, 379 U.S. 203 (1964) and First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981).

Moreover, as discussed above, the Court of Appeals' decision does not allow effects bargaining to excuse an employer's failure to engage in decision bargaining. The decision imposes on respondents a back pay liability which covers the majority of the former Roytype workforce and which runs from the date of the first layoffs in 1984 to the conclusion of a new contract in 1985. A penalty which amounts to several hundred thousand dollars can hardly be characterized as excusing a violation of the Act.

While the petitioner suggests that the Court of Appeals has merged decision bargaining and effects bargaining together, the petitioner's contention is wholly unsupported by, and indeed belied by, the Court of Appeals' decision itself. The Court of Appeals simply concluded, based on the record in this particular case, that bargaining over the decision to transfer work would not have continued beyond the point at which the parties reached agreement on a new contract, since the issue of work relocation inevitably would have played a key role in the negotiations.[8]

---

8 Petitioner claims that such negotiations could not have resulted in impasse or agreement in the absence of the information the union requested but did not receive. This ignores the fact that upon the

(Footnote cont.)

IV. CONCLUSION

Pursuant to the holdings of Rutter–Rex and Sure–Tan, where an NLRB order does not remedy the wrong committed or where delay causes the remedy ordered to no longer serve any remedial purpose of the NLRA, the back pay remedy must be modified to remedy the actual consequences of the unfair labor practice committed. Because the Second Circuit's decision below is in line with the precedent of this Court in Rutter–Rex and Sure–Tan, and because there is no conflict between the circuits on a question of federal law, this Court should deny the petitioner's request for review on the first question.

Additionally, because the Court of Appeals did not find that bargaining over the relocation decision necessarily would have concluded as of the time bargaining over the effects of that decision reached conclusion, this Court should deny the union's petition for a writ of certiorari on the second question.

(Footnote cont.)

expiration of the collective bargaining agreement in March of 1985, the parties would not have had to rely on the NLRB to resolve their differences over work relocation, since both would be free to resort to economic self–help (i.e. a strike or lockout) to force the talks to a conclusion. Even if these tactics had not produced a prompt settlement, they would have suspended the employer's obligation to meet its payroll during the period of the ensuring work stoppage covered by the Board's back pay order.

For the foregoing reasons, Olivetti Office U.S.A., Inc. and Olivetti Supplies respectfully request that the petition be denied in all respects.

RESPONDENTS,
OLIVETTI OFFICE U.S.A., INC.
OLIVETTI SUPPLIES, INC.

By:

BRIAN CLEMOW
RICHARD A. MILLS, JR.
KIMBERLY DEAN CORAN
Shipman & Goodwin
One American Row
Hartford, CT 06103–2819
(203) 251–5000

BRIAN CLEMOW
Counsel of Record